86-460

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

1986 TERM

PATRICK J. MCMAHON; WALTER IMHOFF, JR.; JOHN A. CORNETT; VINCENT P. DENNIS; LEO DWULIT; ANTHONY J. IARUSSI; FRED DEHREN; JAMES T. KYLE; THOMAS F. LORDEON; RAYMOND RIDDLE; DONALD ROTTMAN; and, FRANK VENTO,

Appellants/Petitioners,

vs.

PUTNAM B. MCDOWELL; W.C. BERG, JR.; ROGER F. HUTCHINSON; A. LIMI; D.E. HUFFNER; W.W. JOSEPH; J.D. IVERSON; R.J. DOBBS, JR.; S.R. RACKOFF; R.W. SMITH; D.R. ANDREWS; E.C. QUICK; D.J. BRUBACK; and, J.F. RIES MESTA MACHINE COMPANY,

Appellees,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Pennsylvania Wage Payment and Collection Law (WPCL) is preempted by the Federal Employee Retirement Income Security Act of 1974 (ERISA).

II. Whether the facts of record establish that the corporate officers and directors of Mesta Machine Company who were pension plan fiduciaries under 29 U.S.C. §1109 of ERISA breached their fiduciary duties by failing to collect or attempt to collect delinquent pension plan contributions from Mesta Machine Company.

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STATUTES WHICH THE CASE INVOLVES

PROTECTION OF EMPLOYEE BENEFIT RIGHTS

GENERAL PROVISIONS

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect

the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) **Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries.** It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) **Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum**

standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance. (Sept. 2, 1974, P.L. 93-406, Title I, Subtitle A, §2, 88 Stat. 832.)

§ 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 USCS § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan--

(1) a summary plan description described in section 102(a)(1) [29 USCS § 1022(a)(1)]; and

(2) the information described in section 104(b)(3) [29 USCS § 1024(b)(3)] and 105(a) and (c) [29 USCS § 1025(a) and (c)].

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor. The administrator shall, in accordance with section 104(a) [29 USCS § 1024(a)], file with the Secretary--

(1) the summary plan description described in section 102(a)(1) [29 USCS § 1022(a)(1)];

(2) a plan description containing the matter required in section 102(b) [29 USCS § 1022(b)];
(3) modifications and changes referred to in section 102(a)(2) [29 USCS § 1022(a)(2)];
(4) the annual report containing the information required by section 103 [29 USCS § 1023]; and
(5) terminal and supplementary reports as required by subsection (c) of this section.

(c) Terminal and supplementary reports. (1) Each administrator of an employee pension benefit plan which is winding up its affairs (without regard to the number of participants remaining in the plan) shall, in accordance with regulations prescribed by the Secretary, file such terminal reports as the Secretary may consider necessary. A copy of such report shall also be filed with the Pension Benefit Guaranty Corporation.
(2) The Secretary may require terminal reports to be filed with regard to any employee welfare benefit plan which is winding up its affairs in accordance with regulations promulgated by the Secretary.
(3) The Secretary may require that a plan described in paragraph (1) or (2) file a supplementary or terminal report with the annual report in the year such plan is terminated and that a copy of such supplementary or terminal report in the case of a plan described in paragraph (1) be also filed with the Pension Benefit Guaranty Corporation.

(d) Cross references. For regulations relating to coordination of reports to the Secretaries of Labor and the Treasury, see section 3004 [29 USCS § 1204].

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 101, 88 Stat. 840.)

§ 1082. Minimum funding standards

(a) Avoidance of accumulated funding deficiency. (1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305 [29 USCS § 1085] for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.
(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.
(3) In any plan year in which a multiemployer plan is in reorganization, the accumulated funding deficiency of the plan shall be determined under section 4243 [29 USCS § 1423].

(b) Funding standard account. (1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.
(2) For a plan year, the funding standard account shall be charged with the sum of--

(A) the normal cost of the plan for the plan year,
(B) the amounts necessary to amortize in equal annual installments (until fully amortized)--
(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,
(ii) in the case of a plan which comes into existence after January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 30 plan years.
(iii) separately, with respect to each plan year, the net increase (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years,
(iv) separately, with respect to each plan year, the net experience loss (if any) under the plan, over a period of 15 plan years, and
(v) separately, with respect to each plan year, the net loss (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years,
(C) the amount necessary to amortize each waived funding deficiency (within the meaning of section 303(c) [29 USCS § 1083(c)]) for each prior plan year in equal annual installments (until fully amortized) over a period of 15 plan years, and
(D) the amount necessary to amortize in equal annual installments (until fully

amortized) over a period of 5 plan years any amount credited to the funding standard account under paragraph (3)(D).

(3) For a plan year, the funding standard account shall be credited with the sum of--

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)--

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years,

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years, and

(iii) separately, with respect to each plan year, the net gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years.

(C) the amount of the waived funding deficiency (within the meaning of section 303(c) [29 USCS § 1083(c)]) for the plan year, and

(D) in the case of a plan year for which the accumulated funding deficiency is determined under the funding standard account if such plan year follows a plan year for which such deficiency was determined under the alternative minimum funding standard, the excess (if any) of any debit balance in the funding standard account (determined without regard to this subparagraph) over any debit balance in the alternative minimum funding standard account.

(4) Under regulations prescribed by the Secretary of the Treasury, amounts required to be amortized under paragraph (2) or paragraph (3), as the case may be--

(A) may be combined into one amount under such paragraph to be amortized over a period determined on the basis of the remaining amortization period for all items entering into such combined amount, and

(B) may be offset against amounts required to be amortized under the other such paragraph, with the resulting amount to be amortized over a period determined on the basis of the remaining amortization periods for all items entering into whichever of the two amounts being offset is the greater.

(5) The funding standard account (and items therein) shall be charged or credited (as determined under regulations prescribed by the Secretary of the Treasury) with interest at the appropriate rate consistent with the rate or rates of interest used under the plan to determine costs.

(6) In the case of a plan which, immediately before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], was a multiemployer plan (within the meaning of section 3(37) [29 USCS § 1002(37)] as in effect immediately before such date)--

(A) any amount described in paragraph (2)(B)(ii), (2)(B)(iii), or (3)(B)(i) of this subsection which arose in a plan year beginning before such date shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the amount arose;

(B) any amount described in paragraph (2)(B)(iv) or (3)(B)(ii) of this subsection which arose in a plan year beginning before such date shall be amortized in equal annual installments (until fully amortized) over 20 plan years, beginning with the plan year in which the amount arose;

(C) any change in past service liability which arises during the period of 3 plan years beginning on or after such date, and results from a plan amendment adopted before such date, shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the change arises; and

(D) any change in past service liability which arises during the period of 2 plan years beginning on or after such date, and results from the changing of a group of participants from one benefit level to another benefit level under a schedule of plan benefits which--

(i) was adopted before such date, and

(ii) was effective for any plan participant before the beginning of the first plan year beginning on or after such date,

shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the increase arises.

(7) For purposes of this part--

(A) Any amount received by a multiemployer plan in payment of all or part of an employer's withdrawal liability under part 1 of subtitle E of title IV [29 USCS §§ 1381 et seq.] shall be considered an amount contributed by the employer to or under the plan. The Secretary of the Treasury may prescribe

by regulation additional charges and credits to a multiemployer plan's funding standard account to the extent necessary to prevent withdrawal liability payments from being unduly reflected as advance funding for plan liabilities.

(B) If a plan is not in reorganization in the plan year but was in reorganization in the immediately preceding plan year, any balance in the funding standard account at the close of such immediately preceding plan year--

(i) shall be eliminated by an offsetting credit or charge (as the case may be), but

(ii) shall be taken into account in subsequent plan years by being amortized in equal annual installments (until fully amortized) over 30 plan years.

The preceding sentence shall not apply to the extent of any accumulated funding deficiency under section 418B(a) of the Internal Revenue Code of 1954 [29 USCS § 418B(a)] as of the end of the last plan year that the plan was in reorganization.

(C) Any amount paid by a plan during a plan year to the Pension Benefit Guaranty Corporation pursuant to section 4222 [29 USCS § 1402] or to a fund exempt under section 501(c)(22) of such Code [26 USCS § 501(c)(22)] pursuant to section 4223 [29 USCS § 1403] shall reduce the amount of contributions considered received by the plan for the plan year.

(D) Any amount paid by an employer pending a final determination of the employer's withdrawal liability under part 1 of subtitle E of title IV [29 USCS §§ 1381 et seq.] and subsequently refunded to the employer by the plan

shall be charged to the funding standard account in accordance with regulations prescribed by the Secretary.

(E) For purposes of the full funding limitation under subsection (c)(7), unless otherwise provided by the plan, the accrued liability under a multi-employer plan shall not include benefits which are not nonforfeitable under the plan after the termination of the plan (taking into consideration section 411(d)(3) of the Internal Revenue Code of 1954 [26 USCS § 411(d)(3)]).

(c) Methods. (1) For purposes of this part, normal costs, accrued liability, past service liabilities, and experience gains and losses shall be determined under the funding method used to determine costs under the plan.

(2)(A) For purposes of this part, the value of the plan's assets shall be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value and which is permitted under regulations prescribed by the Secretary of the Treasury.

(B) For purposes of this part, the value of a bond or other evidence of indebtedness which is not in default as to principal or interest may, at the election of the plan administrator, be determined on or amortized basis running from initial cost at purchase to par value at maturity or earliest call date. Any election under this sub-paragraph shall be made at such time and in such manner as the Secretary of the Treasury shall by regulations provide, shall apply to all such evidences of indebtedness, and may be revoked only

with the consent of the Secretary of the Treasury.

(3) For purposes of this part, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

(4) For purposes of this section, if--

(A) a change in benefits under the Social Security Act or in other retirement benefits created under Federal or State law, or

(B) a change in the definition of the term "wages" under section 3121 of the Internal Revenue Code of 1954 [26 USCS § 3121], or a change in the amount of such wages taken into account under regulations prescribed for purposes of section 401(a)(5) of the Internal Revenue Code of 1954 [26 USCS § 401(a)(5)],

results in an increase or decrease in accrued liability under a plan, such increase or decrease shall be treated as an experience loss or gain.

(5) If the funding method for a plan is changed, the new funding method shall become the funding method used to determine costs and liabilities under the plan only if the change is approved by the Secretary of the Treasury. If the plan year for a plan is changed, the new plan year shall become the plan year for the plan only if the change is approved by the Secretary of the Treasury.

(6) If, as of the close of a plan year, a plan would (without regard to this paragraph) have an accumulated funding

deficiency (determined without regard to the alternative minimum funding standard account permitted under subsection (g)) in excess of the full funding limitation--

(A) the funding standard account shall be credited with the amount of such excess, and

(B) all amounts described in paragraphs (2), (B), (C), and (D) and (3)(B) of subsection (b) which are required to be amortized shall be considered fully amortized for purposes of such paragraphs.

(7) For purposes of paragraph (6), the term "full funding limitation" means the excess (if any) of--

(A) the accrued liability (including normal cost) under the plan (determined under the entry age normal funding method if such accrued liability cannot be directly calculated under the funding method used for the plan), over

(B) the lesser of the fair market value of the plan's assets or the value of such assets determined under paragraph (2).

(8) For purposes of this part, any amendment applying to a plan year which--

(A) is adopted after the close of such plan year but no later than 2 1/2 months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,

shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 303(b) [29 USCS § 1083(b)]) and that waiver under section 303(a) [29 USCS § 1083(a)] is unavailable or inadequate.

(9) For purposes of this part, a determination of experience gains and losses and a valuation of the plan's liability shall be made not less frequently than once every 3 years, except that such determination shall be made more frequently to the extent required in particular cases under regulations prescribed by the Secretary of the Treasury.

(10) For purposes of this part, any contributions for a plan year made by an employer after the last day of such plan year, but not later than 2 1/2 months after such day, shall be deemed to have been made on such last day. For purposes of this paragraph, such 2 1/2 month period may be extended for not more than 6 months under regulations prescribed by the Secretary of the Treasury.

(d) Cross reference. For alternative amortization method for certain multiemployer plans

see section 1013(d) of this Act [26 USCS § 412 note].
(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 3, § 302, 88 Stat. 869; Sept. 26, 1980, P. L. 96-364, Title III, § 304(b), 94 Stat. 1293.)

§ 1083. Variance from minimum funding standard

(a) Waiver of requirements in event of business hardship. If an employer, or in the case of a multiemployer plan, 10 percent or more of the number of employers contributing to or under the plan are unable to satisfy the minimum funding standard for a plan year without substantial business hardship and if application of the standard would be adverse to the interests of plan participants in the aggregate, the Secretary of the Treasury may waive the requirements of section 302(a) [29 USCS § 1082(a)] for such year with respect to all or any portion of the minimum funding standard other than the portion thereof determined under section 302(b)(2)(C) [29 USCS § 1082(b)(2)(C)]. The Secretary of the Treasury shall not waive the minimum funding standard with respect to a plan for more than 5 of any 15 consecutive plan years.

(b) Matters considered in determining business hardship. For purposes of this part [29 USCS §§ 1081 et seq.], the factors taken into account in determining substantial business hardship shall include (but shall not be limited to) whether--

(1) the employer is operating at an economic loss,

(2) there is substantial unemployment or underemployment in the trade or business and in the industry concerned,

(3) the sales and profits of the industry concerned are depressed or declining, and
(4) it is reasonable to expect that the plan will be continued only if the waiver is granted.

(c) Definition of "waived funding deficiency". For purposes of this part [29 USCS §§ 1081 et seq.], the term "waived funding deficiency" means the portion of the minimum funding standard (determined without regard to subsection (b)(3)(C) of section 302 [29 USCS § 1082(b)(3)(C)]) for a plan year waived by the Secretary of the Treasury and not satisfied by employer contributions.

(d) Cross reference. For corresponding duties of the Secretary of the Treasury with regard to implementation of the Internal Revenue Code of 1954, see section--412(d) of such Code [26 USCS § 412(d)].
(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 3, § 303, 88 Stat. 872.)

§ 1101. Coverage

(a) This part shall apply to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] (and not exempted under section 4(b) [29 USCS § 1003(b)]), other than--
(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or
(2) any agreement described in section 736 of the Internal Revenue Code of 1954 [26 USCS § 736], which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

(b) For purposes of this part:
(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.
(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:
(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.
(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.
(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 401, 88 Stat. 874.)

§ 1104. Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

b. Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877; Sept. 26, 1980, P. L. 96-364, Title III, § 309, 94 Stat. 1296.)

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest. Except as provided in section 408 [29 USCS § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security of employer real property in violation of section 407(a) [29 USCS § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USCS § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 406, 88 Stat. 879.)

§ 1108. Exemptions from prohibited transactions

(a) Grant of exemptions. The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 [29 USCS § 1106] and 407(a) [29 USCS § 1107(a)]. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is--

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) [29 USCS § 1106(a)] or 407(a) [29 USCS § 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) [29 USCS § 1106(b)] unless he affords an opportunity for a hearing and makes a determination on the record with respect to

the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from 29 USCS § 1106 prohibitions. The prohibitions provided in section 406 [29 USCS § 1106] shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6) [29 USCS § 1107(d)(6)]), if--

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 407(d)(5) [29 USCS § 1107(d)(5)]).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if--

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution of affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is--

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or

annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if--

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company

supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if--

(A) the transaction is a sale or purchase of an interest in the fund.

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of this Act [29 USCS § 1344] (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of title IV [29 USCS §§ 1381 et seq.].

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 [29 USCS § 1411].

(c) Fiduciary benefits and compensation not prohibited by 29 USCS § 1106. Nothing in section 406 [29 USCS § 1106] shall be construed to prohibit any fiduciary from--

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as

applied to all other participants and beneficiaries;
(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or
(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees. Section 407(b) [29 USCS § 1107] and subsections (a), (b), (c), and (e) of this section shall not apply to any transaction in which a plan, directly or indirectly--
(1) lends any part of the corpus or income of the plan to;
(2) pays any compensation for personal services rendered to the plan to;
or
(3) acquires for the plan any property from or sells any property to;
any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of the Internal Revenue Code of 1954 [26 USCS § 401(c)(3)]), a member of the family (as defined in section 267(c)(4) of such Code [26 USCS § 267(c)(4)]) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50

percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of this subsection a shareholder employee (as defined in section 1379 of the Internal Revenue Code of 1954 [26 USCS § 1379]) and a participant or beneficiary of an individual retirement account, individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409 of the Internal Revenue Code of 1954 [26 USCS §§ 408 or 409]) and an employer or association of employers which establishes such an account or annuity under section 408(c) of such code [26 USCS § 408(c)] shall be deemed to be an owner-employee.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property. Sections 406 and 407 [29 USCS §§ 1106 and 1107] shall not apply to the acquisition or sale by a plan or qualifying employer securities (as defined in section 407(d)(5) [29 USCS § 1107(d)(5)]) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4) [29 USCS § 1107(d)(4)])--

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under Section 407(e)(1) [29 USCS § 1107(e)(1)]),

(2) if no commission is charged with respect thereto, and

(3) if--

(A) the plan is an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not a eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a) [29 USCS § 1107(a)].

(f) Applicability of statutory prohibitions to mergers or transfers. Section 406(b)(2) [29 USCS 1106(b)(2)] shall not apply to any merger or transfer described in subsection (b)(11).
(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 408, 88 Stat. 883; Sept. 26, 1980, P. L. 96-364, Title III, § 308, 94 Stat. 1295.)

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he

became a fiduciary or after he ceased to be a fiduciary.
(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 409, 88 Stat. 886.)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan:

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or

(B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this tile; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions. (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respct [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), and if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(c) Administrator's refusal to supply requested information. Any administrator who fails or refuses to compl, with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters

reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.
(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil

actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) Construction and application. (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.
(B) Neither an employee benefit plan described in section 4(a) [29 USCS § 1003(a)], which is not exempt under section 4(b) [29 USCS § 1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.
(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act [29 USCS § 1136].
(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(c) Definitions. For purposes of this section:
(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or

indirectly, the terms and conditions of employee benefit plans covered by this title.

OPINIONS BELOW

The United States District Court for the Western District of Pennsylvania Opinion and Order is unreported and is appended at App. A-62. The Opinion of the United States Court of Appeals for the Third Circuit is unreported and is appended at App. A-1.

STATEMENT OF THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED

The Judgment Order of Adams, Gibbons and Stapleton Circuit Judges for the United States Court of Appeals for the Third Circuit was entered on June 24, 1986. This Petition seeking determination and relief as provided in 28 U.S.C. §2106 is filed within ninety (90) days of the entry of the judgment in accordance with United States Supreme Court Rules, Rule 12.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by virtue of 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action was brought by former employees of the Mesta Machine Company (Mesta) against Mesta and certain of its former officers and directors, namely the corporate pension plan fiduciaries. The employees sought wages, pension contributions, and fringe benefits which were owed to them under the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 832 (codified as amended in various sections of 26 and 29 U.S.C.), the Pennsylvania Wage Payment and Collection Law (WPCL), 43 Pa. C.S.A. §260.1 et seq. (Supp. 1985), and state and federal common law.

The suit was initially filed in Pennsylvania's state court, and then removed to the United States District Court for the Western District of Pennsylvania based on the ERISA claims under 29 U.S.C. §1132 and 28 U.S.C. §1441(a). After stipulating to

certain facts, the parties filed cross-motions for summary judgment.

The Mesta officers and directors asserted two primary defenses. The first was that the employees' WPCL claims are preempted by ERISA. The second was that no violation of their fiduciaries duties had been established by the facts. The District Court held that ERISA does preempt the WPCL and that no violation of ERISA had been established under the facts as stipulated.

Additionally, the District Court refused to exercise its discretion to hear Plaintiffs' pendent state law claims. The holding of the District Court was appealed to the United States Court of Appeals for the Third Circuit which affirmed the Order from below in all respects in an Opinion filed June 24, 1986. It is from this Opinion that Petitioners here seek review.

ARGUMENT

I. THIS CASE SHOULD BE REVIEWED BECAUSE OF THE CONFLICT IN THE CIRCUIT COURTS ON THE SCOPE OF ERISA PREEMPTION OF STATE LAWS.

In holding that the WPCL is preempted by 29 U.S.C. §1144(a) of ERISA, the Court of Appeals relied primarily on the decisions of this Court in Shaw vs. Delta Airlines, Inc., 463 US 85, 103 SCt 2890 77 LEd2d 490 (1983) and Metropolitan Life Insurance Company vs. Massachusetts, 471 US ____ 85, LEd2d 718, 105 SCt 2380 (1985).

The basic point of the Third Circuit Opinion was that the WPCL "relates to" ERISA and is, therefore, preempted. That Court cited language in Metropolitan Life, supra at 2389 as support for its conclusion:

> The preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. (emphasis added)

However, the WPCL does not attempt to regulate the substantive requirements of ERISA plans. It is a remedial and punitive law, complimentary and consistent with congressional intent and ERISA, which provides an incentive to pension plan fiduciaries to comply with ERISA.

The Pennsylvania WPCL represents an exercise of the state police power reserved to the states under the Tenth Amendment of the United States Constitution. At such, it is entitled to great deference in the judicial attempt to properly reconcile and balance the plenary power of Congress under the Commerce Clause of Article II against the sovereignty of the states and their police power to protect citizen workers and retirees.

Reliance by the Third Circuit on the "common-sense definition of 'relate'" found in Black's Law Dictionary as quoted in Shaw,

supra at 97 does not add anything to the language of the statute, but merely begs the question.

If the broad interpretation of the inherently ambiguous phrase "relate to" given by the Third Circuit is to be accepted, many other state laws in addition to the WPCL will become unconstitutional, an indecent and undesirable result which could not have been intended by Congress. See 29 U.S.C. §1001. Congressional Findings and declaration of policy.

The United States Court of Appeals for the Ninth Circuit has held that a California statute prohibiting employment discrimination which was applicable to the relationship between a pension trust fund and the trust's own employees was not preempted by ERISA. Lane vs. Goren, 743 F2d 1337 (CA9 1984).

The Court said that "although the preemptive effect on ERISA is broad, it is not all encompassing". Id. at 1339.

> The plain language of the statute establishes at least three conditions which must be met before a court may find a state statute is superseded. First, The state law must "relate to" an employee benefit plan. Second, the state law is not preempted if it regulates insurance, banking, or securities, or is a generally applicable criminal law. Third, the statute must attempt to reach in one way or another the "terms and conditions of employee benefit plans". 29 U.S.C. §1144(c)(2). We find that neither the first nor the third parts of this test are satisfied in this Case.

Id. at 1339.

The Ninth Circuit went on to say that "[T]he state statutes in no way regulate the terms and conditions of an ERISA plan. We reach this conclusion without giving the phrase 'terms and conditions' a narrow interpretation. ERISA imposes participation,

funding, and vesting requirements on pension plans. §§201-306, 29 U.S.C. §§1051-86..." citing Shaw vs. Delta Airlines, Inc., supra.

The Court further explained that ERISA sets uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans, citing §§161-111, 401-414, 29 U.S.C. §§1021-31, 1101-14; and Shaw vs. Delta Airlines, Inc., supra.

The United States Court of Appeals for the Second Circuit held that a New York statute prohibiting hospitals from establishing inpatient charges for self-insured employee benefit plans other than as authorized by statute, was not preempted by ERISA. Rebaldo vs. Cuomo, 749 F2d 133 (CA2 1984), cert. denied, ___ US _____, 105 SCt 2702, 86 LEd2d 718 (1985).

The Rebaldo Court cited Lane vs. Goren, supra, for the proposition that "the pre-

emptive scope of ERISA is neither all encompassing... nor unlimited". Id. at 138; Savings and Profit Sharing Fund of Sears Employees vs. Gago, 717 F2d 1038, 1040 (7th Cir. 1983). And the Court cited Shaw vs. Delta Airlines, Inc., 103 SCt at 2901 N.21 and American Telephone and Telegraph Company vs. Merry, 592 F2d 118, 121 (CA2 1979) for the statement that "ERISA does not invalidate those State statutes whose effect on pension plans is simply tangential in nature". Id. at 138.

> It is equally clear that ERISA does not preempt every state law that incidentally touches pension plans through its effect on individuals. See, eg American Tel & Tel. Co. vs. Merry, supra, 592 F2d at 123-26 (garnishment of pension benefits to collect alimony and child support).

Id. at 138.

In explaining why the preemption argument does not withstand scrutiny, the Rebaldo Court pointed out that state laws and

municipal ordinances regulating zoning, health, and safety increase the operational costs of ERISA trusts, "but no one could seriously argue that they are preempted". Lane vs. Goren, supra at 1340; see also American Progressive Life and Health Insurance Company vs. Corcoran, 715 F2d 784, 787 (CA2 1983). Id. at 138.

"The containment of hospital costs is an exercise of a state's police powers, which should not be superseded by federal regulations unless that was the clear intent of Congress". Id. at 138, citing Alessi vs. Raybestors-Manhattan, Inc., 451 US 504, 522 101 SCt 1895 68 LEd2d 402 (1981); Massachusetts Nursing Association vs. Dukakis, 726 F2d 41, 44 (CA1 1984); see Ray vs. Atlantic Richfield Company, 435 US 151, 157, 98 SCt 988, 994, 55 LEd2d 179 (1978). "Accordingly, a state's promulgation of hospital rate schedules should not be found

to 'relate' to 'the terms and conditions of employee benefit plans' unless this conclusion is unavoidable" see Alessi, supra 451 US at 522, 101 SCt at 1905, Id. at 138 (emphasis added).

> Where, as here, a State statute of general application does not affect the structure, administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated.
>
> Moreover, such indirect economic impact as may result from state control over hospital rates does not run counter to ERISA's aim of national uniformity in plan regulation. See Shaw vs Delta Airlines, supra 103 SCt at 2890 N.20.

Id. at 139.

The United States Court of Appeals for the Seventh Circuit held that ERISA did not preempt Wisconsin's property distribution law or a Wisconsin state court order compelling a retirement fund to pay a former wife one-half

of the value of her former husband's vested interest in the fund. Savings and Profit Sharing Fund of Sears Employees vs. Gago, 717 F2d 1038 (CA7 1983).

The Gago Court discussed two tests which this Court has articulated for "determining whether a sufficient conflict arises when a federal statute appears to clash with state law" to require a finding of preemption of the state law:

> The first of these tests provides that there is a sufficient conflict where "compliance with both federal and state regulations is a physical impossibility... Florida Lime and Avacado Growers, Inc. vs. Paul, 373 US 132, 142-43, 83 SCt 1210, 1217 10 LEd2d 248 (1963). The second test provides that a conflict will be found where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". Hines vs. Davidowitz, 312 US 52, 67, 61 SCt 399, 404, 85 LEd 581 (1941).

Id. at 1041.

The Pennsylvania Wage Payment and Collection Law meets both of these tests. First, there is no conflict at all between compliance with ERISA and the WPCL. And second, the WPCL, instead of being an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress", actually effectuates and compliments that purpose.

The Illinois Wage Payment and Collection Law recently withstood a preemption challenge in a federal district court in Illinois. National Metalcrafters vs. McNeil, et al., CCH Pension Plan Guide, No. 526, p. 7 (Dist. Ill., 1985). In that case, the court said that any state law, like the Illinois law, that sanctions criminal penalties for failure to make certain wage payments is not preempted by ERISA.

In addition to the substantial body of federal case law holding that state laws

which do not "relate to" the substantive provisions of employee pension plans are not preempted, there is an equally cognizable body of recent state case law which is in accord.

The California Court of Appeals held that a state law giving employee benefit funds a lien against property on which covered work was performed, in order to collect delinquent contributions from a construction contractor, was not preempted by ERISA. Carpenter's Health and Welfare Trust Fund vs. Parnas Corp., (No. AO27366, Jan. 29, 1986); 13 BNA Pension Reporter 320 (Feb. 17, 1986).

The court found that the state lien law was "no obstacle preventing state law from operating in this case because it imposed a burden on interstate commerce or ERISA, but, instead, aided in ERISA enforcement". Id. at _____.

> In fact, ERISA §§502(a)(1)(B) and (e)(1) give state courts concurrent jurisdiction in actions to recover delinquent contributions, and the law's legislative history indicates that Congress intended to provide the full range of legal and equitable remedies available in both state and federal courts, the appellate court added".

Id. at _____ ; see also 29 U.S.C. §1132(e) Jurisdiction.

Another decision of the New York Court of Appeals, which is directly on point herein is Sasso vs. Vachris, 6 EBC 2393 (NY CA 1985).

The question presented was whether the New York Business Corporation Law §630, which provided a mechanism for employees to recover unpaid contributions to their pension funds and welfare benefits directly from the ten largest shareholders of a closely held corporation, is preempted by ERISA because it impermissibly regulated the terms and

conditions of employee benefit plans. That court concluded that it did not:

> As noted, section 630 is remedical in nature; it provides an additional enforcement mechanism by which plaintiffs can recover delinquent contributions already due and owing to them pursuant to the corporation's obligations under the collective bargaining and trust agreements. It does not "regulate, directly or indirectly, the terms and conditions" of plaintiffs' welfare and pension plan (29 USC §1144(c)(2)) and, therefore, does not "relate to" the employee benefit plan, within the meaning of section 514(a) of ERISA. ... To the contrary, section 630 "relates to" the scope of shareholder immunity, excluding the ten largest shareholders of a closed corporation from such immunity, not only as to employee benefit plans but also for all debts, wages or salaries due employees for services performed for the corporation. Like the Pennsylvania Wage Payment and Collection Law considered in Carpenter's Health and Welfare Fund of Philadelphia vs. Kenneth R. Ambrose, Inc. (citations omitted) and the garnishment statute invoked

> against the pension plan interest of an employee by a former wife seeking payment of past due support in American Telephone and Telegraph Company vs. Merry, (citations omitted) the only effect of section 630 on employee benefit plans is to give plaintiffs a cause of action to recover payments the corporation was already obligated to provide. If the statutes has any palpable effect on the plan, it is the type tenuous, remote, or peripheral effect that ERISA was not meant to preempt. Sasso vs. Vachris, supra. at 2395-2396. (Emphasis Added).

Similarly, this Court has taken cognizance of the fact that not all state law actions concerning or premised on violations of employee benefit plans are preempted by ERISA. In Shaw vs. Delta Airlines, Inc., 463 U.S. 85, 103 SCt 2890, 77 LEd 2d 490 (1983) the Supreme Court stated that "[a] law 'related to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan". Id. at 501, 103 SCt at 2900. In a

later footnote, the Court expressly indicated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law relates to 'the plan'". 77 LEd 2d at 503.

Suggesting such a situation, the Court cited American Telephone and Telegraph Company vs. Merry, 592 F2d 118, 121 (CA2 1979), which held that state garnishment of a spouse's pension income to enforce alimony and support orders is not preempted by ERISA. Id. at 503 N.21, 102 SCt at 2901-02 N. 21. See also, Kelly vs. International Business Machines Corporation, 573 F. Supp 366 (ED PA 1983).

The Third Circuit's reliance on Metropolitan Life Insurance Company vs. Comm. of Massachusetts, supra. is misguided. As noted previously herein, the phrase the court quotes is "the preemption provision was

intended to displace all state laws that fall within its sphere", 105 SCt at 2389 (emphasis added). Since the WPCL does not attempt to regulate the substantive provisions of employee benefit plans mandated by ERISA, it does not fall within the sphere of ERISA's preemption. Instead, the WPCL merely provides a remedial measure for employees against plan fiduciaries (not corporate employers covered by ERISA), who fail to perform their statutory duties.

This Court made its position clear on the general scope of preemption in Allis-Chalmers Corporation vs. Lueck, 471 US ___, 105 SCt ___ , 85 LEd2d 206, at 213 (1985):

> "...the question of whether a certain state action is preempted by federal law is one of Congressional intent. The purpose of Congress is the ultimate touchstone.

And in Metropolitan Life, supra. at 745:

> States possess broad authority under their police powers to regulate the employment

relationship to protect the workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety... are only a few examples. (citations omitted). State laws requiring that employers contribute to unemployment and workmen's compensation fund... have withstood scrutiny. (citations omitted). Federal law in this sense is interstitial, supplementing state law where compatible, and supplementing it only when it prevents the accomplishment of the purposes of the federal act (citations omitted). Thus, the Court has recognized that it 'cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the state'. (citations omitted). 'A holding that the states were precluded from acting would remove the backdrop of state law that provided the basis of congressional action. and would artificially create a no-law zone'. (citations omitted). 86 LEd2d at 751... Where the preemptive effect of federal enactments is not explicit, 'courts sustain a local regulation' unless it conflicts with federal law or

> frustrates the federal scheme, or unless the Court's discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states. (citations omitted).

In Nachman vs. PBGC, 466 US 359, 100 SCt 723, 64 LEd2d, 36 -367 (1980), this Court tated the purpose of ERISA:

> One of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated... Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement and if he has fulfilled whatever conditions are required to obtain a vested benefit that he actually receives it.

The WPCL is exactly the kind of state aw that the Court was referring to in etropolitan Life, supra. It gives employees viable cause of action directly against

officers and directors of a corporation who fail to meet their fiduciary obligations toward the workers and retirees.

It would analomous and unjust result indeed to use the very law intended by Congress to protect employees' and retirees' vested pensions to defeat the specific purpose of that law. The holding of the Third Circuit Court of Appeals in this case, that ERISA preempts the WPCL, should be reversed in order to be in harmony and accord with the purpose and intent of Congress, the opinions of this Honorable Court, the majority of federal and state jurisdictions in the United States, and principles of equity and justice.

II. BREACH OF FIDUCIARY DUTY UNDER 29 U.S.C. §1109(a) OF ERISA PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

The District Court held that there was no breach of a fiduciary duty under 29 U.S.C. §1109 by the directors and officers of Mesta

who were, as plan administrators, fiduciaries with a duty to collect funds from Mesta for the employee pension plans. The Court of Appeals agreed with the District Court that there was no breach of fiduciary duty, because the Defendants inaction was "reasonable" under the circumstances (see Opinion at p. 23). But it is difficult to fathom how failing to even attempt to collect the funds from an ongoing business was anything but a breach of fiduciary duty under the circumstances. No one doubts that these same plan administrations received their own salaries from Mesta.

The District Court and the Third Circuit erred in relying on the waiver allowed by 29 U.S.C. §1083 as a provision that would preclude finding a breach of fiduciary duty as set forth under Argument, Section A. The fiduciaries of the plan had a duty <u>first</u> to the plan. Their decision to allow the

company to avoid immediate payment of pension obligations through the use of the Internal Revenue Service waiver in no way absolved them of their breach of duty as fiduciaries to the plan. The §1083 waiver was never intended by Congress to serve such a purpose.

Section 1104(a)(1) of Title 29, states that a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of...providing benefits to participants and their beneficiaries..."

McDowell, et al. breached their fiduciary duty under 29 U.S.C. §1109(a) of ERISA and the employee pension plan when they admittedly failed to collect or attempt to collect the funds owed by Mesta to the employees Pension Plans. (See Stipulated Fact, No. 51). As plan administrators, collection of the funds and a voidance of

Mesta postponing its payments was their primary duty, one which they utterly failed to discharge. There was nothing "reasonable" about the admitted failure of the plan fiduciaries to collect or attempt to collect the pension plan funds from Mesta. This duty could have been carried out at the time.

Although under ERISA plan, fiduciaries can have dual loyalties when acting as plan administrators, their sole duty of loyalty is to the plan and its beneficiaries. This was set forth in Donovan vs. Bierwirth, 538 F.Supp. 463, 468 (ED NY 1981):

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries... Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1) (emphasis added). Therefore, although a trustee may have dual loyalties, when acting on behalf of the fund, his primary loyalty to the fund is the only loyalty which may affect his judgment. (Emphasis is that of District Judge Mishler).

And, as was aptly pointed out in Struble vs. New Jersey Brewery Employees Welfare Trust Fund, 732 F2d 325 at 331-332 (CA3 1984):

> Section 1109, in turn, holds the Trustees personally liable to make good to [the] plan any losses to the plan resulting from their breach of fiduciary duty. 29 U.S.C. §1109(a) 1976. Finally, Section 1132 gives a beneficiary or fiduciary an action for appropriate relief under Section 1109. 29 U.S.C. §1132(a)(2) 1976.

The Court in Struble, supra sustained the plaintiff-beneficiaries cause of action for a deficiency in benefits against pension plan trustees charged with the duty of managing the pension plan based on a failure of the pension plan trustees to collect pension plan contributions.

The Third Circuits Opinion at p. 18 states that:

> [F]iduciaries have a Section 404 obligation "to avoid placing themselves in a

> position where their acts as directors or officers of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees". Donovan vs. Bierwirth, 680 F2d. 263, 271 (CA2) cert. denied 45a. U.S. 1069 (1982) This duty may in some circumstances require the fiduciary to step aside in favor of a neutral referee, or at the least, to conduct an explicit inquiry into the potential for a conflict of interest. (Emphasis Added).

A conditional waiver of pension plan funding requirements by the Internal Revenue Service pursuant to 29 U.S.C. §1083 is not intended to absolve the plan fiduciaries from any liability they might incur pursuant to 29 U.S.C. §1109. Only a Mesta Fiduciary, acting in that capacity, could have properly sought a §1083(a) "Waiver of Requirements in the Event of Business Hardship". The waiver was available to Mesta, the corporate employer, not to the pension plan fiduciaries as an alternative to discharging their duties.

Many of the officers and directors of Mesta were also Pension Plan fiduciaries; they hav been sued in their capacity as Plan fiduciaries under ERISA as well as officers and directors of Mesta.

The duty of care imputed to ERISA employee benefit plan fiduciaries requires that plan fiduciaries act "solely in the interest of the participants and beneficiaries" (the duty of loyalty) and wit the "care, skill, prudence, and diligence" o a prudent man acting in like circumstances". (the duty of care) 29 U.S.C. §1104(a); Struble, supra. The Directors and Officers, although allowed under ERISA to ac in dual fiduciary capacities, are not absolved by operation of the waiver provisio of 29 U.S.C. §1083 from liability for breach of their primary, indeed sole, duty under th circumstances of the specific transaction

(i.e. failure to collect or attempt to collect the funds from Mesta for the plans).

For the Plan administrators/fiduciaries to relinquish all of Mesta's assets to a bank as security on a loan agreement, while the pension plan went unfunded demonstrates the type of conflict of interest situation which ERISA was intended to eliminate. ERISA merely allows fiduciaries to act in a dual capacity, but it also charges them to place their first loyalty to the plan beneficiaries and does not condone their acting for anyone other than the plan beneficiaries. Clearly, there is an inherent conflict of interest in such a case, see Flinchbaugh vs. Chicago Pneumatic Tool Company, 531 FSupp. 110 (WD PA 1982).

The case of Donovan vs. Bierwirth, 538 F.Supp 463 (ED NY 1981), aff'd as modified, 680 F2d 263 (CA2 1982), cert. denied, 459 US

1069 (1982) sets forth an interpretation of the fiduciary standard applicable to ERISA:

> At the outset, we hold that ERISA contemplates the existence and approval, in certain circumstances, of fiduciaries acting on behalf of a pension plan even though they have dual loyalties... Having provided for an unorthodox departure from the common law rule against dual loyalties, Congress provided two statutory safeguards to protect plan participants and beneficiaries. First, the statute provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries... Section 404(a)(1) of ERISA 29 U.S.C. §1104(a)(1) (emphasis added). Therefore, although a trustee may have dual loyalties, when acting on behalf of the fund, his primary loyalty to the fund is the only loyalty which may affect his judgment". (emphasis is that of District Judge Mishler).

Id. at 468.

The Donovan Court set forth a two-part test to determine whether or not dual

loyalties are violative of ERISA safeguards. The test states:

> Section 407 of ERISA is Congress' authorization for a trustee to invest in sponsor corporation stock in spite of dual loyalties and conflicting interests so long as (1) he acts exclusively for the benefit of the plan beneficiaries and participants and otherwise complies with ERISA Section 404; and, (2) his actions are not violative of the proscriptions of ERISA Section 406.

Id. at 469.

Additionally, the Donovan Court noted that a "trustee having dual loyalties has 'an special obligation to act fairly on behalf of those concerned with the results of the action taken". Id. at 469; citing Withers vs. Teachers Retirement System of The City of New York, 447 F. Supp 1248, 1256 (SD NY 1979). There is no doubt that Donovan, supra stands for the proposition that while ERISA allows for fiduciaries to have dual loyalties, it does not allow for actual conflict of inter-

est transactions which are in derogation of the interests of the plan beneficiaries.

Furthermore, McMahon, et al. have alleged and shown facts, (i.e., agreeing not to collect or attempt to collect the pension plan funds from Mesta), which constitute a violation of 29 U.S.C. §1106(a)(1)(B), (i.e., an illegal extension of credit on the part of the plan to a party-in-interest, namely Mesta), and indeed, the parties have already stipulated to these facts. The only issue is the legal significance of the actions of the plan fiduciaries under ERISA, 29 U.S.C. §1106(a)(1)(b). Section 1106 reads:

> §1106. Prohibited Transactions.
>
> (a) Transactions between plan and part in interest. Except as provided in Section 408 [29 U.S.C. §1108]: (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect --
> (b) Lending of money or other extension of credit between

> the plan and a party-in-interest; (emphasis added).

29 U.S.C. §1108, Exemptions from Prohibited Transactions, allows at subsection (a) "the Secretary of the Treasury to grant exemptions from the restrictions of §1106". However, it also unequivocally states that:

> The Secretary may not grant an exemption under this subsection unless he finds that such exemption is -- (a) in the interest of the plan and of its participants and beneficiaries and (3) protective of the rights of participants and beneficiaries of such plan.

The main point to note in relation to §1108(a) Exemptions from prohibited transactions is that, in the instant case, none of them are applicable. Consequently, McDowell, et al. have violated §1106(a)(1)(b). This makes them liable to McMahon, et al. under 29 U.S.C. §1109(a) of ERISA, "Liability for Breach of Fiduciary Duty".

CONCLUSION

Because of the conflict among the Circuits of the United States Court of Appeals on the scope of ERISA preemption of state laws which "relate to" employee pension plans and the important nature of this issue as well as that of what acts by whom and under what circumstances constitute a breach of fiduciary duty under 29 U.S.C. §1109 of ERISA, the Petitioners respectfully request that this Honorable Court grant Petitioners'

Petition for Writ of Certiorari and set this Case for full review of the constitutional and legal issues raised herein.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3570

PATRICK J. McMAHON; WALTER IMHOFF, JR.; JOHN A. CORNETT; VINCENT P. DENNIS; LEO DWULIT; ANTHONY J. IARUSSI; FRED DEHREN; JAMES T. KYLE; THOMAS F. LORDEON; RAYMOND RIDDLE; DONALD ROTTMAN; and FRANK VENTO

vs.

PUTNAM B. McDOWELL; W. C. BERG, JR.; ROGER F. HUTCHINSON; A. LIMI; D. E. HUFFNER; W. W. JOSEPH; J. D. IVERSON; R. J. DOBBS, JR.; S. R. RACKOFF; R. W. SMITH; D. R. ANDREWS; E. C. QUICK; D. J. BRUBACK; and J. F. RIES
MESTA MACHINE CO.

PATRICK J. McMAHON; WALTER IMHOFF, JR.; JOHN A. CORNETTA; VINCENT P. DENNIS; LEO DWULIT; ANTHONY J. IARUSSI; FRED KEHREN; JAMES T. KYLE; THOMAS F. LORDEON; RAYMOND RIDDLE; DONALD ROTTMAN; FRANK VENTO; CHARLES B. DUKE; EDWARD HUDAK; WILBUR G. BEAMER; DENNIS MANGAN; CHARLES PATTON; STANLEY KASIAN; JOHN RHULE; and EDWARD ZYCH.

Appellants

Appeal from the United States District Court for the Western District of Pennsylvania - Pittsburgh

(Civil Action No. 83-1716)

Argued April 17, 1986

BEFORE: ADAMS, GIBBONS, and STAPLETON,
Circuit Judges
(Opinion Filed: June 24, 1986)

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OPINION OF THE COURT

STAPLETON, Circuit Judge:

I

This action was brought by former employees of the Mesta Machine Company ("Mesta") against Mesta and certain of its former officers and directors. The plaintiffs seek wages, pension contributions, and fringe benefits allegedly owed to them under the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406, 88 Stat. 832 (codified as amended in scattered sections of 26 and 29 U.S.C.), the Pennsylvania Wage Payment and Collection Law

("WPCL"), 43 Pa. Cons. Stat. §260.1 et seq. (Supp. 1985), and state contract law. The suit was initially filed in state court, but defendants removed it to federal court based upon the ERISA claim, 29 U.S.C. § 1132 and 28 U.S.C. § 1441(a).

The parties, after stipulating to certain facts, filed cross-motions for summary judgment. According to these stipulations, the following claims are still at issue in this case:

- Claims of salaried workers for unpaid wages under state law
- Claims of hourly and salaried workers for unpaid fringe benefits under

state law[1]

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1. Plaintiffs' complaint states no ERISA claim with respect to the fringe benefits plans. The parties defined "fringe benefits" for this litigation as "those benefits, other than wages and pension benefits, payable to or on behalf of the hourly workers and/or the salaried workers ... but limited as follows: vacation, vacation bonus, savings and vacation benefits, severance benefits and supplemental unemployment benefits." Unlike the pension benefits, Mesta paid for some fringe benefits out of operating revenues, accounting for them as operating expenses. All fringe benefits for the salaried employees and the hourly employees affiliated with Local 2178 of the International Association of Machinists and Aerospace Workers were paid for in this manner. The savings and vacation benefits, and supplemental unemployment benefits for the other hourly employees were also paid out of operating revenues. However, the vacation benefits, vacation bonus, and severance benefits for these other hourly employees were paid out of the pension trusts of the pension plan maintained for those workers.

The district court, in granting summary judgment for defendants, stated that all the pension and fringe benefits plans "appear[][to]...come under the scope of ERISA." The plaintiffs do not contest that ruling and we express no opinion on the district court's observation regarding ERISA coverage of the fringe benefits. Compare California Hospital Assoc. v. Henning, 770 F.2d 856(9th Cir. 1985) (upholding 29 C.F.R. § 2510.3-1(b)(3)); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502 (9th Cir. 1985).

- Claims of hourly and salaried workers for unpaid pension plan contributions under ERISA and state law.

The defendant officers and directors asserted, inter alia, that ERISA had preempted plaintiffs' state law claims for pension contributions and fringe benefits and that no ERISA violation had been shown. The district court agreed with defendants as to the preemption of state law and the absence of an ERISA violation. The court then exercised its discretion to refrain from hearing plaintiffs' remaining pendent state claims and also did not resolve Mesta's claim that its discharge in bankruptcy insulated it from liability. The plaintiffs appealed these rulings.

This Court has plenary review upon the appeal from the grant of summary judgment upon stipulated facts. Solomon v. Klein, 770 F.2d 352, 353 (3d Cir. 1985); Goodman v. Mead

Johnson & Company, 534 F.2d 566, 573-74 (3d Cir. 1976), cert. denied 429 U.S. 1038 (1977).

II

A. The Pension Plans

Mesta maintained separate pension plans for its hourly and salaried workers. These plans were non-contributory, defined-benefit plans, under which the employees were to receive pensions in specified amounts after retirement and upon reaching a certain age. The terms of the hourly workers' plan were reached through collective bargaining while those of the salaried workers' plan were set by Mesta alone. The required level of contribution to both plans was determined by reference to ERISA's funding requirements and the level of benefits promised to the employees. Both pension plans were approved by the Internal Revenue Service ("IRS") as qualified under under 26 U.S.C. § 401(a), and

were employee pension benefit plans and pension plans within the meaning of those terms as defined by ERISA Section 3(2)(A)(i), 29 U.S.C. § 1002(2)(A)(i).

Mesta's annual pension contributions were due by September 15 of the year following the plan year to which the contributions applied. Until plan year 1980, Mesta contributed the amounts recommended by the plans' actuaries and was in compliance with the plans and ERISA. However, between 1977 and 1981, Mesta's financial condition took a severe turn for the worse. During that period, its operating results dropped from an $8.8 million profit to a $23.9 million loss. At the same time, the notes payable by Mesta to its banks increased from $1.3 million to $25 million, and Mesta defaulted on several of these notes. As a condition of the banks' waiver of default on notes and the continued extension of credit,

in March 1981, Mesta and the banks entered into a revolving credit agreement. Under this agreement, Mesta pledged all its assets, including real estate, plants, equipment, inventory, accounts receivable, stock in subsidiaries, and most contract rights, to the banks.

As a result of its financial difficulties, in 1981, when the 1980 plan year contributions were due, Mesta "did not have cash sufficient to make [them] and, at the same time, pay all of the other operating expenses of its business and retire its debt to the Banks as required by the Revolving Credit Agreement."

Mesta therefore applied to the IRS for a waiver of the minimum funding standards pursuant to 29 U.S.C. § 1083. The IRS granted this request for plan year 1980. In 1982, pursuant to the agreement with the IRS, Mesta paid the necessary installments of the

contributions that had been waived for the 1980 plan year. Mesta later applied to the IRS for a second waiver, this time for the 1981 plan year. This application was still pending when Mesta sought protection in bankruptcy in February 1983. Following Mesta's Chapter Eleven filing, the IRS denied the application, but by that time the automatic stay provisions of the bankruptcy code were in effect. 11 U.S.C. § 362. Mesta has made no further pension plan contributions.

In September 1983, Mesta sought to terminate the pension plans. With the approval of the Pension Benefit Guaranty Corporation ("PBGC"), the plans were terminated as of June 16, 1983. When the pension plans were terminated, the plans did not have sufficient assets to pay all beneficiaries their full pension benefits. PBGC, as successor trustee of the plans, took custody of all their assets and filed claims

against Mesta to recover contributions owed by Mesta to the plans. In Mesta's bankruptcy reorganization, PBGC acquired various assets of Mesta on behalf of the pension plans.

PBGC continues as successor trustee to the pension plans and is paying the former Mesta employees the portion of their vested benefits that is guaranteed by ERISA and the plans.

B. Preemption of State Law by ERISA

Plaintiffs seek unpaid wages, fringe benefits, and pension plan contributions from the individual defendants pursuant to state common-law and the WPCL, 43 Pa. Cons. Stat. Ann. §§ 260.3(a) & (b) (Supp. 1985), quoted

in the margin.[2] The WPCL imposes liquidated

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2. The WPCL reads, in relevant part:

> Every employer shall pay all wages, other than fringe benefits and wage supplements, due to his employees on regular paydays designated in advance by the employer. . . ."
>
> Every employer who . . . agrees to pay or provide fringe benefits or wage supplements, must remit the deductions or pay or provide the fringe benefits or wage supplements . . .

43 Pa. Cons. Stat. § 260.3(a) & (b)(Supp. 1985).

The WPCL defines "wages" and "fringe benefits" broadly: "Wages" include

> all earnings of an employee . . . [and] also includes fringe benefits or wage supplements whether payable by the employer from his funds or from amounts withheld from the employees' pay by the employer . . . [Fringe benefits include] all monetary employer payments to provide benefits under any employee benefit plan, as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., as well as separation, vacation, holiday, or guaranteed pay . . ."

Section 260.2a. (emphasis added)

damages and criminal liability for failing to make such payments. 43 Pa. Cons. Stat. Ann. §§ 260.10 & 260.11a (Supp. 1985), and authorizes any employee to sue to recover owed wages and benefits. 43 Pa. S. § 260.9a (Supp. 1985). The plaintiffs argue that their "claims for wages, vacation pay, severance allowance, fringe benefits and pension contributions are damages clearly described by the WPCL, and the directors and officers as senior management corporate employees have the personal statutory responsibility to make such wage, fringe benefit and wage supplement payments." The defendants argued, and the district court agreed, that the plaintiffs' state law claims for pension and fringe benefits, including the WPCL claims for such benefits, were preempted by ERISA.

ERISA contains an explicit and broad preemption provision. ERISA "shall supersede

any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title." Section 514(a), 29 U.S.C. § 1144(a).[3] By this language, Congress meant to establish pension plan regulation as an exclusively federal concern. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). It sought to reserve to itself the "sole power to regulate" the field of employee benefit plans, Shaw v. Delta Airlines, Inc., 463 U.S. 85, 99 (1983). Accordingly, Congress intended the preemption provision to have a scope as broad as its language suggests. Shaw, 463 U.S. at 98.

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3. The plaintiffs do not argue that any of the specific exceptions to Section 514(a) are applicable here and we therefore express no opinion on this subject.

The Supreme Court has recently discussed the proper interpretation of this language:

> The phrase "relate to" [is] given its broad common-sense meaning, such that a state law "relate[s] to" a benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." [Shaw, 463 U.S. at 97]. The preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. "[E]ven indirect state action bearing on private pensions may enroach upon the area of exclusive federal concern."

Metropolitan Life Insurance Co. v. Mass., _____ U.S. _____, _____, 105 S.Ct. 2380, 2389 (1985) (emphasis added and some citations omitted). In Shaw, the Supreme Court turned to Black's Law

Dictionary 1158 (5th ed. 1979) for its a common-sense definition of "relate": "To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with. "Shaw, 463 U.S. at 97 n. 16.

The WPCL and other state law claims are therefore preempted -- insofar as they authorize the recovery of the pension contributions and fringe benefits from the individual defendants -- if they "relate" to the Mesta employee benefit plans.

We believe that the WPCL, as employed by plaintiffs, plainly relates to the Mesta pension plans and therefore is preempted by Section 514(a), 29 U.S.C. § 1144(a). Insofar as the WPCL authorizes the liability of Mesta or of its directors and officers for unpaid employee benefit plan obligations, it obviously relates, refers, and pertains to the underlying employee benefit plans. The

WPCL itself explicitly includes ERISA plans within its scope. 43 Pa. Cons. Stat. Ann. § 260.2a (1985 Supp.). Indeed, the very existence of liability for unpaid pension contributions is, in the first instance, a result of the federal scheme. Plaintiffs would be able to determine the amount of any recovery under the WPCL only by reference to the benefit plans and the provisions of ERISA.

The plaintiffs implicity recognize the close relation between the ERISA-governed benefit plans and the remedy they seek under state law. In their principal brief, plaintiffs assert that the WPCL is consistent with and even "supplements ERISA, . . . making the payment of employee creditors a priority over the payment of other creditors." This argument does not help plaintiffs, for as the Supreme Court has observed, the absence of a direct conflict will not save a state law

that relates to a covered employee benefit plan. Metropolitan Life; Shaw.

Moreover, the WPCL, as invoked by plaintiffs, does not merely relate to Mesta's pension plans, it competes with the mechanism that Congress carefully established in ERISA itself. Congress set in place particular processes for the recovery of delinquent contributions:

> [ERISA] places the obligation for funding and the penalty for underfunding on the person on whom it belongs--namely, the employer. This is achieved by imposing an excise tax where the employer fails to meet the funding standards, which starts out at a relatively modest level and increases sharply where there is continued failure to make the indicated contributions. More specifically, if an employer fails to contribute sufficient amounts to meet

> the new funding requirements, he will be subject to a nondeductible excise tax of 5 percent per year on the amount of the underfunding for any year. If the employer fails to make up the underfunding by 90 days after original notification by the Internal Revenue Service, . . . then the employer is subject to a second level excise tax amounting to 100 percent of the underfunding....

S. Rep. No. 93-383, 93d Cong., 1st Sess. 24, reprinted in 1974 U.S. Code Cong. & Ad. News at 4890, 4909-10, and in 1 Legislative History of the Employee Retirement Income Security Act of 1974, at 1063, 1092 (1976) (hereinafter cited as Legislative History).

If an employer nonetheless refuses to make the required plan contributions, ERISA also permits a civil action to be brought in order to enforce the provisions of the

statute and of the plan. Sections 501(a) and 4068(d), 29 U.S.C. §§ 1132(a), 1368(d).

Furthermore, the statute, Sections 4001-4068, 29 U.S.C. §§ 1301-1368, and the regulations, 29 C.F.R. §§ 2615-2623, institute a comprehensive framework designed to accommodate the different policies implicated when an employer seeks to terminate a single employer plan that has not been fully funded. See Nachman Corp. v. PBGC, 446 U.S. 359, 374-75 (1980); S. Rep. No. 93-383, 93d Cong., 1st Sess. 7-8, 66-71, 78-93, reprinted in 1974 U.S. Code Cong. & Ad. News at 4895-96, 4950-55, 4962-77 and in 1 Legislative History at 1075-76, 1134-39, 1146-61. This scheme, which includes plan termination insurance and gives the plan preferred status as a creditor, does not contemplate that the substantial liability imposed upon a terminating employer will be supplemented by private state law actions. Section 4068, 29 U.S.C. §

1368.[4] Had Congress intended to impose the additional liability sought by plaintiff, it surely knew how to do so. However, it chose not to authorize this sort of personal liability. See Solomon v. Klein, 770 F.2d 352, 354 (3d Cir. 1985).

We find additional support for our analysis in the explanation of Senator Harrison Williams, one of ERISA's principal sponsors: "State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans -- unless a criminal

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4. In fact, in the case at bar, PBGC acquired various assets of Mesta pursuant to claims it filed on behalf of the benefit plans during the bankruptcy proceedings.

statute of general application -- establishing state termination insurance programs, et cetera, will be superseded." (Sen. Debate, August 22, 1974; Legis. Hist. at 4770-71).[5]

The conclusion is inescapable that the WPCL relates to the Mesta benefit plans in a way that Congress sought to foreclose by Section 514(a), 29 U.S.C. § 1144(a). Plaintiffs are here attempting to avoid ERISA's mechanisms for enforcing benefit plan contributions and to substitute instead a state regulation that circumvents the scheme carefully devised by Congress. This they may not do. Gilbert v. Burlington Industries, 765 F.2d 320, 327 (2d Cir. 1985), appeal pending 106 S.Ct. 378 (1986); Holland v.

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5. As noted at p. 7, supra, the WPCL provides for criminal penalties for the failure to contribute to employee benefit plans.

Burlington Industries, 772 F.2d 1140, 1147 (4th Cir. 1985).[6]

Plaintiffs argue that Carpenters Health & Welfare Fund v. Ambrose, 727 F.2d 279 (3d Cir. 1983), precludes this conclusion. Ambrose involved a suit for delinquent pension funds contributions. The fund trustees sued under Section 301 of the LMRA, 29 U.S.C. § 185(a), seeking to enforce related provisions of a collective bargaining agreement, and under the WPCL to recover the delinquencies. In their briefs before this court, the trustees urged that the WPCL was not preempted by ERISA because there was no

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6. To the extent that plaintiffs are seeking, under Pennsylvania common law, to recoup unpaid pension plan contributions or employee benefit payments to which they claim entitlement, these claims also are preempted by Section 514(a).

inconsistency between the provisions of the two statutes. The Ambrose court dismissed in a footnote the contention that ERISA pre-empted the WPCL as "without merit," 727 F.2d at 282 n.5. It found "the Ambroses personally liable under the WPCL for the delinquent pension benefit contributions." Id. at 283.

When Ambrose was submitted to this court, the Supreme Court's decision in Shaw had not yet been announced and there is no reference to it in the Ambrose opinion. Moreover, subsequent to the issuance of the Ambrose opinion, the Supreme Court decided Metropolitan Life Insurance, 105 S.Ct 2380 (1985). Shaw and Metropolitan Life make it very clear that state laws relating to a covered plan, even those that are arguably consistent with the goals of ERISA, are preempted by Section 514(a), 29 U.S.C. § 1144(a). We do not believe that this aspect

of Ambrose can survive Shaw and Metropolitan Life. While a panel of this court is bound to follow the decision of an earlier panel in the absence of intervening Supreme Court precedents mandating a different result. IOP Chapter VIII Section C, "as an inferior court in the federal hierarchy, we are, of course, compelled to apply the law announced by the Supreme Court as we find it on the date of our decision." United States v. City of Philadelphia, 644 F.2d 187, 192 n.3 (3d Cir. 1980). As we have observed, we "may not countenance the continued application in this circuit of a rule, even of our own devising, which is patently inconsistent with the Supreme Court's pronouncements." Cox v. Dravo Corporation, 517 F.2d 620, 627 (3d Cir.) cert. denied 423 U.S. 1020 (1975). See also United States v. Thevis, 665 F.2d 616, 626 (5th Cir.) cert. denied in 456 U.S. 1108 (1982), and in 458 U.S. 1109 (1982), and in

459 U.S. 825 (1982) ("although ordinarily a panel must adhere to prior decisions of this court, our first duty is to follow the dictates of the United States Supreme Court."); Ralpho v. Bell, 569 F.2d 607, 629 (D.C. Cir. 1977).

The district court's holding that plaintiffs' state law claims for fringe benefits and pension contributions are preempted by ERISA is correct and must be affirmed.

C. Breach of Fiduciary Duty

The plaintiffs' ERISA claim seeks to impose liability on the pension plan fiduciaries for their failure to collect delinquent pension plan contributions and on Mesta for its failure to make those

contributions.[7] Plaintiffs allege that this was a breach of the fiduciaries' duties under Section 409, 29 U.S.C. § 1109.[8] The parties' stipulation of facts poses the sole issue relevant to the question of breach of fiduciary duties:

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7. Plaintiffs did not raise an ERISA claim for unpaid fringe benefits in the district court. Plaintiffs stipulated that such benefits were not "employee welfare benefit plans" within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). Therefore, we do not address plaintiffs' belated contention, made at oral argument before this court, that they are making a claim for fringe benefits under ERISA, Brown v. Sielaff, 474 F.2d 826, 828 (3d Cir. 1973); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 3974, at 421 (1977).

8. Section 409 states that "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed on fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from such breach . . ."

> As to any director or officer who may have been a fiduciary . . . the sole issue as to plaintiffs' claims that the directors and officers breached fiduciary duties under ERISA or otherwise violated ERISA is whether or not any director or officer breached such a duty in failing to collect pension contributions or in failing to cause pension contributions to be collected by or for the pension trusts.

Plaintiffs do not assert that the fiduciaries engaged in self dealing or prohibited transactions within the meaning of Sections 406 and 407, 29 U.S.C. §§ 1104, 1106, or that Mesta's application for the Section 303 waiver, 29 U.S.C. § 1083, formed the basis for any violation. Nor do plaintiffs assert that the fiduciaries' restraint

was motivated by bad faith.[9]

The district court believed that the defendants' failure "to collect certain pension contributio[illegible] [does not] constitute a breach . . . since the defendants' alleged failure was pursuant to the provisions of § 1083 of ERISA." The plaintiffs except to this analysis and argue that while a Section 303 waiver may prevent a plan from losing its qualified status under the Internal Revenue Code, it "did not excuse the alleged obligations of Mesta and/or the Directors and Officers to make Pension Contributions to the Pension Trusts".

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9. At oral argument before this court the plaintiffs sought to add an allegation that by refusing to collect the plan contributions the fiduciaries had extended credit to Mesta in violation of the prohibited transactions rules. We, of course, express no opinion on this issue.

Plaintiffs attempt to characterize their federal claim against Mesta and the individual defendants as one brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). However, actions brought under Section 502(a)(1)(B) are personal in nature and "seek to declare the plaintiff beneficiary's rights under the plan, to recover benefits personally due him, or to enforce his personal rights." Livolsi v. R.A.M. Construction Company, 728 F.2d 600, 602 (3d Cir. 1984).

As the Supreme Court has held, a recovery under Section 409 for damages for breach of fiduciary duty does not go to any individual plan participant or beneficiary,

but inures to the benefit of the plan as a whole. Massachusetts Mutual Life Insurance Company v. Russell, ____ U.S. ____, ____, 105 S. Ct. 3085 (1985). Section 409 does not authorize a private right of action for compensatory relief. Id. Since plaintiffs' sole ERISA claim is that the fiduciaries breached their fiduciary obligations, which is a violation of Section 409, they cannot characterize their ERISA claim as one to recover benefits due to them. Accordingly, this claim is not appropriately brought under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

However, this suit is proper under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). Section 502(a)(2) authorizes a beneficiary of a benefit plan to bring an action against a plan fiduciary who has violated the fiduciary duty requirements of Sections 409 and 404. Massachusetts Mutual, _____ U.S. at _____,

105 S.Ct. at 3089. Therefore, these plaintiffs have standing under 29 U.S.C. § 1132(a)(2) to assert that the fiduciaries of their pension plans breached their fiduciary duties.

Furthermore, if a beneficiary or participant can show that the plan fiduciaries breached their duties, he may also be able to recover damages, for the benefit of the plan, directly from the employer. Struble v. New Jersey Brewery Employees Welfare Trust Fund, 732 F.2d 325(3d Cir. 1984). However, the employer cannot be sued by the participants or beneficiaries under Section 502(a)(2), 29 U.S.C. § 1132(a)(2), without first establishing that the fiduciaries breached their fiduciary duties. "[T]he beneficiaries may not maintain a derivative action against the Employers unless they first show a fiduciary

breach in the Trustees' decision . . ." Id. at 338.

Therefore, to recover damages from the employer, Mesta, or from the pension plans' fiduciaries, plaintiffs must first demonstrate that the fiduciaries have breached their fiduciary duties. Struble, 732 F.2d at 336-37.

Section 404, 29 U.S.C. § 1104, imposes the applicable standard of behavior where, as here, a plaintiff charges that plan fiduciaries have not acted for the sole benefit of plan participants and beneficiaries. Struble, 732 F.2d at 333-34. Section 404(a)(1)(A) requires the plan fiduciary to act "solely in the interest" of the participants and beneficiaries and for the "exclusive purpose" of providing benefits to them and defraying the costs of running the plan. Moreover, in pursuit of these ends, the fiduciary must act "with the care, skill,

prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Section 404(a)(1)(B).

This standard, based upon the common-law conception of a trustee, is quite rigorous. See Raymond, ERISA Trusts and Tender Offers, 13 Sec. Reg. L. Rev. 253, 257-59 (1985). It requires a trustee to "exclude all selfish interest and all consideration of the interests of third persons." 7 G. Bogert, The Law of Trusts and Trustees § 543 at 197-98 (2d rev. ed 1978). Although ERISA's fiduciary duty requirements are based on the common law of trusts, the federal scheme departs from the common-law rule in at least one significant area. ERISA does not absolutely bar a plan fiduciary from simultaneously serving as a director or officer of

the employer or of another "party in interest." Section 408(c)(3), 29 U.S.C. § 1108(c)(3); see Raymond, 13 Sec. Reg. L. Rev., at 253. Accordingly, no ERISA violation arises solely because the plan fiduciaries also were employed by Mesta. However, while a plan fiduciary does not violate ERISA merely by being associated also with the employer, Section 408 does not sanction any derogation from the strict requirements of Section 404. See Sutton v. National Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied 467 U.S. 1205 (1984).

Moreover, fiduciaries have a Section 404 obligation "to avoid placing themselves in a position where their acts as directors or officers of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees." Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.) cert. denied 459 U.S. 1069

(1982). This duty may, in some circumstances, require the fiduciary to step aside in favor of a neutral referee, or at the least, to conduct an explicit inquiry into the potential for a conflict of interest. See Id.; Raymond, 13 Sec. Reg. L. Rev. at 272-73. However, plaintiffs have stipulated that the only issue with regard to their claim that the trustees breached their fiduciary duties concerns the failure to collect pension loan payments. There is thus no allegation that the trustees breached their duties by failing to investigate alternative courses of action or to seek the guidance of a neutral third party.

Under traditional trust law doctrine, incorporated into ERISA, if a "trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit . . .

against the trustee joining the obligor as co-defendant." 4A. Scott, Law of Trusts § 282.1 at 2339 (3d ed. 1967) (citation omitted); See Struble, 732 F.2d at 336-37. However, if under the circumstances it is prudent to refrain from bringing an action, so that the trustee does not violate his duty in so refraining, the beneficiaries can neither compel him to sue nor can they themselves maintain a suit against the third party. Scott, supra. Furthermore, although "a trustee should not without sufficient reason fail to take steps to enforce a claim, yet he can properly abandon a claim where it appears that a suit would be futile . . . and there is no other method of enforcing the claim." 3 Scott § 192 (footnote omitted). We believe that, on the stipulated facts of the case at bar, the plan fiduciaries here have not been shown to have acted imprudently

in refraining from seeking to collect the pension plan contributions.

ERISA set minimum funding standards for anticipated pension liabilities incurred by employees' service prior to ERISA's effective date of January 1, 1975. Such liabilities are known as "past service liabilities" and employers generally have up to forty years fully to fund them. Section 302(b), 29 U.S.C. § 1082. ERISA also imposes an obligation to fund currently arising pension obligations. Under these provisions of the statute and the terms of the pension plans, Mesta was to make payments to the pension plans sufficient to fund currently accruing benefits thereunder and to bring unfunded past service liabilities up to date over a thirty-year time period. Section 302(b)(2)(B)(i), 29 U.S.C. § 1082(b)(2)(B)(i).

Section 303(a), 29 U.S.C. § 1083(a), permits a financially troubled employer, upon application to the IRS, to obtain a waiver of its required level of contribution to a benefit plan. See 26 U.S.C. § 412(d). A variance is authorized only in "situations where the employer did not forsee and could not reasonably have been expected to forsee. . . the event which causes the business hardship," H. Rep. No. 93-807, 93rd Cong., 2d Sess, 82 (1974), reprinted in 1974 U.S. Code Cong. and Ad. News 4670, 4746, and in 2 Legislative History 3121, 3202, and in cases "where the application of this requirements would involve substantial business hardship to the employer and would be adverse to the interests of plan participants in the aggregate." Id. at 25, reprinted in 1974 U.S. Code Cong. and Ad. News at 4692, and in 2 Legislative History at 3145. See Section 303(a), 29 U.S.C. §

1083(a); H. Rep. No. 93-1280, 93rd Cong. 2d Sess. 282-84 (1974), reprinted in 1974 U.S. Code Cong. and Ad. News 5038, 5063-65, and in 3 Legislative History 4277, 4549-51.

In deciding whether to grant such a waiver, the IRS must consider whether:

(1) the employer is operating at an economic loss,

(2) there is substantial unemployment or underemployment in the trade or business and in the industry concerned,

(3) the sales and profits of the industry concerned are depressed or declining, and

(4) it is reasonable to expect that the plan will be continued only if the waiver is granted.

Section 303(b), 29 U.S.C. § 1083(b); see 26 U.S.C. § 412(d)(2). Any payments waived

are to be made up over the next fifteen years. 29 U.S.C. § 1082(b)(2)(C).

The plaintiffs admit that the Section 303 waiver insulated Mesta from the penalty tax and from the loss of the qualified status of the plans. Plaintiffs argue, however, that the waiver did not excuse Mesta's obligations imposed by Section 302 to make the contributions to the pension plans. We find the conclusion unavoidable that Congress also intended Section 303 to excuse the employer from the obligation to make a current contribution in cases of financial hardship.

The legislative history gives no hint that Congress intended a Section 303 waiver to have the limited effect suggested by plaintiff. On the contrary, it clearly indicates that once such a waiver is obtained, the employers' obligation to pay is deferred. As one of the House Reports

states, "Within limits, employers who are financially unable to meet the funding requirements should be allowed to postpone paying contributions to their plans." H. Rep. No. 93-779, 93d Cong., 2d Sess. 73 (1974), reprinted in 2 Legislative History at 2662. See Sen Rep. No. 93-383, 93rd Cong., 1st Sess. 25 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 4890, 4910, and in 1 Legislative History at 1093; Id. at 57, 61-63, reprinted in 1974 U.S. Code Cong. & Ad. News at 4942, 4946-47, and in 1 Legislative History at 1125, 1129-31; H. Rep. No. 93-779, 93rd Cong. 2d Sess., 5, 25 (1974), reprinted in 2 Legislative History at 2594, 2614.

Moreover, the rationale for the Section 303 waiver cannot be limited as plaintiffs suggest. Congress adopted the waiver provision out of concern that, without such a mechanism, employers would terminate their

employee benefit plans rather than risk exposure to ERISA liability.

> An employer is under no obligation to initiate or continue his ERISA plan. Thus, in instances of financial hardship, if the employer was obligated to continue funding the plan at a level higher than he could afford, he might instead choose to terminate the plan. Congress did not believe that in such a situation of financial hardship an employer should be forced to abandon his plan. This is the reason for the variance rule of Section 303.

Sen. Rep. No. 93-383, 93rd Cong., 1st Sess. 61-63 (1973), reprinted in Legislative History at 1129-31.

Congress, by permitting hardship variances, sought to discourage employers from terminating plans in times of financial difficulty. This rationale applies equally

to Section 409 liability, 29 U.S.C. § 1109, as to the tax penalties. An individual trustee, who was also an officer or a director of an employer deciding whether to terminate a plan, and who is exposed to civil and criminal liability for the breach of fiduciary duties, would find little comfort in the Section 303 waiver if it had no effect on the employer's obligation to contribute or on his duty to seek contributions from the employer. Were we to accept plaintiffs' reasoning, we believe that such individuals would be likely to terminate plans despite the possibility of obtaining a Section 303 waiver. This was the very result Congress intended to discourage by providing the waiver option in Section 303.

We therefore disagree with plaintiffs' suggestion. As the purpose of Section 303 is to discourage premature plan terminations, it temporarily waives the employer's obligation

to contribute to a plan, and thus insulates the employer from the penalties of a lower funding level, including suits by trustees seeking to enforce Section 302. Accordingly, the trustees breached no fiduciary duty in failing to bring suit against Mesta to enforce the minimum funding obligations that had been waived.

Moreover, we believe the existence of the Section 303 waiver has additional significance in this case. That waiver demonstrates that a neutral party, the Secretary, decided that, given Mesta's financial position in 1981, requiring the Section 302 contribution would create a significant potential of harm to the interests of the plan participants and make it likely that the plan would be terminated. This fact is significant in the context of the later period during which Mesta's second Section 303 waiver request was

pending because the stipulated facts relating to that period show no change of circumstance which would support a contrary conclusion.

It normally will be reasonable for plan fiduciaries to refrain from action which might send the employer into bankruptcy or lead to the termination of the plan. On the facts stipulated here, we believe this explains and justifies the failure of the plan fiduciaries to institute collection litigation. In short, we agree with the district court that the fiduciaries' inaction during the period from the granting of the first waiver in December 1981 until the

February 1983 bankruptcy filing was responsible.[10]

We do not, of course, suggest that pension trustees will always be justified in declining to bring suit against an employer who has applied for a Section 303 waiver of its minimum funding requirements. Indeed, whenever an employer seeks to avoid making its pension plan payments, whether pursuant to Section 303 or in any other manner, trustees have a duty to investigate the relevant facts, to explore alternative courses of action and, if in the best interests of the plan participants, to bring suit against the employer. See Struble, 732

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10. The failure of the IRS to grant the second waiver request does not suggest a contrary conclusion. The IRS will typically deny a request for a waiver if the employer is in bankruptcy. This apparently is an indication that, in such circumstances, plan termination is more appropriate than waiver. Osgood, The Law of Pensions and Profit-Sharing, 99 (1984).

F.2d at 335; Donovan, 680 F.2d at 271. These duties, and the overriding obligation to maintain a primary loyalty to the fund, are heightened, if anything, when the trustees also serve as officers of the employer company, as here.

Nonetheless, the parties in this action have stipulated that the employer was in dire financial straits, and there is no allegation that its application for a Section 303 waiver was made in bad faith. Moreover, plaintiffs have produced no evidence that a collection action by trustees would have produced any beneficial results for the fund. As summary judgment was granted by the district court on a detailed set of stipulated facts and after cross motions for summary judgment had been filed, it appears clear that plaintiffs have had full opportunity to develop the record. In light of these considerations, we hold that the trustees did not breach their

fiduciary duties in failing to institute collection actions against Mesta. As noted above, this conclusion precludes the imposition of liability under ERISA on Mesta, as well as on the trustees. See Struble, 732, F.2d at 336-37.

III

Therefore, the district court's grant of summary judgment in favor of defendants on the ERISA claim will be affirmed. As the plaintiffs' federal claims against Mesta and the trustees were properly disposed of, the district court's dismissal of plaintiffs' pendant state law claims will also be affirmed. See Greenfield v. Heublein, Inc., 742 F.2d 751, 760 (3d Cir. 1984).

A True Copy:

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Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PATRICK J. McMAHON, WALTER IMHOFF, JR., JOHN A. CORNETT, VINCENT P. DENNIS, LEO DWULIT, ANTHONY J. IARUSSI, FRED DEHREN, JAMES T. KYLE, THOMAS F. LORDEON, RAYMOND RIDDLE, DONALD ROTTMAN and FRANK VENTO,	)	
Plaintiffs	)	
v.	)	Civil Action No. 83-1716
PUTNAM B. McDOWELL, W.C. BERG, JR., ROGER F. HUTCHINSON, A. LIMI, D.E. HUFFNER, W.W. JOSEPH, J.D. IVERSON, R.J. DOBBS, JR., S.R. RACKOFF, R.W. SMITH, D.R. ANDREWS, E.C. QUICK, D.J. BRUBACK and J.F. RIES and MESTA MACHINE COMPANY,	)	
Defendants	)	

O P I N I O N

This action was brought by and on behalf of former hourly and salaried workers (hereinafter "Plaintiffs") of the Mesta Machine Company (hereinafter "Mesta") against that company and against certain of its former directors and officers (hereinafter

"Individual Defendants"). The Plaintiffs allege that these defendants are liable to them for certain potential unpaid pension and fringe benefits and for salaried workers' unpaid wages under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., the Pennsylvania Wage Payment and Collection Law (WPCL), 43 P.S. § 260.1 et seq., and state law.

Defendant Mesta, by its successor Mestek, Inc., filed a Motion for Summary Judgment, alleging that it was discharged of any obligations it may have had to its former employees due to its filing under the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 et seq., and its receipt of a Final Decree terminating its reorganization case. The Individual Defendants have also filed a Motion for Summary Judgment. They assert that the Plaintiffs' state law claims are preempted by ERISA, that the Plaintiffs

cannot allege ERISA claims and that none of ERISA's provisions dealing with fiduciary duties were violated. If the allegations of Mesta and the Individual Defendants are correct, judgment could be entered in their favor.

In addition, the Plaintiffs have filed a Motion for Summary Judgment and contend that they are entitled to judgment on the issue of liability on their ERISA and WPCL claims as a matter of law.

A court, when considering a motion for summary judgment, should only grant the motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). All inferences, doubts and issues of credibility should be resolved

against the moving party. E.E.O.C. v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983).

PREEMPTION OF STATE LAW CLAIMS FOR PENSION AND FRINGE BENEFITS

The Individual Defendants contend that 29 U.S.C. § 1144(a), ERISA's preemption provision, applies to the Plaintiffs' state law claims for pension and fringe benefits and preempts these claims. The defendants base their views on numerous cases interpreting the scope of § 1144(a).

The Plaintiffs, on the other hand, rely primarily on the case of Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279 (3d Cir. 1983), to support their position that their state law claims are not preempted. This reliance, however, is misplaced because that case does not involve ERISA, a statute with a specific preemption

provision. The case only involves a suit under the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), and WPCL. Since ERISA was not involved in the Ambrose case, the Plaintiffs cannot rely on a statement in a footnote that a contention of ERISA pre-emption was without merit.

ERISA was designed as a "'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981), quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980). It contains a broad preemption provision, 29 U.S.C. § 1144(a), which states that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title."

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S.--85 L.Ed.2d 728 (1985). The Court of Appeals for the Third Circuit has even said that "ERISA wholly regulates and federalizes the pension field. Section 1144 preempts any state law relating to ERISA-covered pension plans." Murphy v. Heppenstall Co., 635 F.2d 233, 237 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1981).

It appears that the pension and fringe benefits plans in this case come under the scope of ERISA, as such plans are defined in 29 U.S.C. § 1002, which means that the statute's broad preemption clause would apply. The result of this application is preemption of the Plaintiffs' state law claims unless the state laws fall within one of the preemption exception areas. It does not appear, however, that the state law relied on by the Plaintiffs falls within any exception. Therefore, the Plaintiffs' state

law claims are subject to preemption by ERISA and must be dismissed. The Plaintiffs' sole source of relief with regard to their claims involving pension and fringe benefit plans is ERISA.

ERISA CLAIM

All of the defendants, in their Memorandum of Law in Support of the Motions for Summary Judgment, assert that the Plaintiffs have no right to recover damages under ERISA. The Individual Defendants further contend that, even if the Plaintiffs can directly seek recovery under ERISA, the Plaintiffs have failed to allege that the former directors and officers breached their fiduciary duties under that statute.

The Plaintiffs' position is that the Individual Defendants did breach their fiduciary duties under that statute.

Section 1132 of ERISA states that a participant or beneficiary of a covered plan

can bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to claim his rights to future benefits under the terms of the plan . . . ." 29 U.S.C. § 1132(a). This section has recently been interpreted by the Court of Appeals for the Third Circuit in the case of Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984). In Struble, beneficiaries of an employees' trust fund sought to charge the trustees with breaching their duties of care and loyalty as fiduciaries by failing to collect the appropriate amount of employer contributions. The beneficiaries also sought damages from their employers based on a breach of the trust fund agreement for the employers' failure to pay the full contribution amount. The court held that the beneficiaries did not have a direct action

for damages under ERISA against their employers and could not maintain a derivative action unless they could first demonstrate a fiduciary breach by the trustees. The court said that if the beneficiaries "can establish that the [trustees] breached their fiduciary duties . . . , [they] will be able to assert the rights of the Trust Fund as if they themselves were the [trustees." Id., at 339.

In this case, based on the reasoning in Struble, the Plaintiffs would have to establish that the Individual Defendants violated their fiduciary duties before they could assert the rights of the fiduciaries of the pension benefit plan in a derivative action against Mesta, their former employer. The key question, then, is whether or not there has been a violation of fiduciary duties by the Individual Defendants under ERISA.

Section 1104(a) states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" and requires that a fiduciary act:

> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . .

29 U.S.C. § 1104(a).

The fiduciary standard spelled out in § 1104(a) should be strictly applied where the Plaintiffs' "complaint is not that the trustees have incorrectly balanced valid interest, but rather that they have sacrificed valid interests to advance the

interests of non-beneficiaries." Struble, at 333-34.

This Court, even after resolving all inferences and doubts against the moving parties, is of the view that the Individual Defendants' position is correct, in that the Plaintiffs have failed to allege a breach by them of their fiduciary duties under ERISA. The Plaintiffs' assertions that the actions by these defendants in failing to collect certain pension contributions constitute a breach of their fiduciary duties do not rise to the level required to find such a breach under ERISA since the Defendants' alleged failure was pursuant to provision of § 1083 of ERISA. 29 U.S.C. § 1083. Nor is this Court persuaded by the case law offered by the Plaintiffs in support of their position on the question of whether there has been a breach. Therefore, the Individual Defendants

are entitled to summary judgment on the ERISA claims.

And, because this Court has found no breach on the part of the Individual Defendants, the Plaintiffs cannot maintain a direct action for damages against Mesta. Mesta is also entitled to summary judgment in its favor.

WAGE CLAIM

A certain group of Plaintiffs, salaried workers, have a claim for wages under Pennsylvania state law. However, this Court will not retain jurisdiction over this claim due to our dismissal of the Plaintiffs' ERISA claim, which was the basis of jurisdiction in federal court for this case.

An appropriate order will be issued.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PATRICK J. McMAHON, WALTER IMHOFF, JR., JOHN A. CORNETT, VINCENT P. DENNIS, LEO DWULIT, ANTHONY J. IARUSSI, FRED DEHREN, JAMES T. KYLE, THOMAS F. LORDEON, RAYMOND RIDDLE, DONALD ROTTMAN and FRANK VENTO,	)	
Plaintiffs	)	
v.	)	Civil Action No. 83-1716
PUTNAM B. McDOWELL, W.C. BERG, JR., ROGER F. HUTCHINSON, A. LIMI, D.E. HUFFNER, W.W. JOSEPH, J.D. IVERSON, R.J. DOBBS, JR., S.R. RACKOFF, R.W. SMITH, D.R. ANDREWS, E.C. QUICK, D.J. BRUBACK and J.F. RIES and MESTA MACHINE COMPANY,	)	
Defendants	)	

O R D E R

AND NOW, this 4th day of September, 1985, IT IS ORDERED that:

(1) the Motion for Summary Judgment filed by the Plaintiffs is DENIED;

(2) the Plaintiffs' state law claims for pension and fringe benefits having been preempted are DISMISSED with prejudice;

(3) the Motion for Summary Judgment filed by the Individual Defendants is GRANTED;

(4) the Motion for Summary Judgment filed by Mestek, Inc., successor to Mesta Machine Company, being Moot is DENIED;

(5) judgment is entered in favor of all the defendants and against the plaintiffs on all matters except for the wage claim by the salaried workers; and

(6) the wage claim by the salaried workers is DISMISSED without prejudice.

United States District Judge

cc: Counsel of Record

CERTIFICATE OF SERVICE

I, Robert O Lampl, certify that on this 19th day of September, 1986, I served three(3) true and correct copies of the Petition for Writ of Certiorari upon all parties required to be served in this Case, in accordance with the Rules of the Supreme Court of the United States:

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